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The decision of United States Judge Nelson on the constitutionality of Chinese legislation, of which we made mention in our last issue, involved the construction and validity of what is known as the Geary Act passed in 1891, and not the original exclusion act, as might be supposed from the language used by us. The Geary Act was intended to supplement the original measure and provides that all Chinese in this country must within a year register their names and deposit their photographs in the offices of the United States Collectors of Revenue, and obtain a certificate, in default of which the offender may be arrested and taken before a United States judge, who has power to sentence him to imprisonment and thereafter to be sent out of the country. This was declared unconstitutional by Judge Nelson.

Morley v. Lake Shore & Michigan Southern Ry. Co., decided by the United States Supreme Court, affirming the decision of the New York Court of Appeals, may be a correct exposition of the law but it will strike many as unreasonable and inequitable. In 1879 the legislature of New York reduced the legal rate of interest from seven to six per cent. The act also expressly provided that it should not affect any contract or obligation made before the passage of the act. A citizen of that State recovered a judgment in a State court against a railway company. This judgment was affirmed. Execution was issued in 1881, and the judgment was paid with interest but only at the rate of six per cent. from the beginning of 1880. The plaintiff demanded more, claiming that the statute reducing the rate of interest did not and could not apply to his judgment. The New York court held, however (95 N. Y. 428), that the statute had the effect of reducing the interest on this judgment previously recovered notwithstanding the proviso of the act and that a judgment, although based upon a contract was not itself a contract or obligation within the meaning of this exception and that the act so construed did not impair the obligation of a contract within the meaning of the federal constitution. Upon appeal, the United States Supreme Court, accepting the decision of the New York Court as conclusive upon the construction of the statute, considered whether the act so construed affected the obligation of a contract, within the meaning of the constitution. Justice Shiras, speaking for the majority of the court, held that it did not. The court declared that the question whether interest shall accrue upon a judgment is not a matter of contract between the parties to the judgment, but a matter controlled by the discretion of the legislature, which are left free to do as they see fit in regard to allowing interest as a penalty or as liquidated damages for the non-payment of a judgment. A distinction was made between a judgment on a contract providing for interest and a judgment based on a tort or on a contract not itself prescribing interest until payment. If the contract provides for interest until payment, the payment of the interest, the court said, is as much a part of the obligation as that of the principal, but in the case of a cause of action, whether a tort or a broken contract, not providing for interest until payment, the question whether interest shall accrue upon the judgment is not a matter of contract but of legislative discretion, which is free to provide for interest as a penalty or liquidated damages, or not to do so. The duty to pay interest on such a judgment is a duty prescribed by statute and not by agreement of the parties, and the judgment itself is not a contract within the meaning of the constitution. "The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. A judgment is in no sense a contract or agreement between the parties." Citing Wyman v. Mitchell, 1 Cow. 316, 221; McCown v. Railroad Co., 50 N. Y. 176; Bidleson v. Whytel, 3 Burr. 1545; Bush v. Gower, 2 Strange, 1043; Louisiana v. Mayor, 109 U. S. 283, 285; Garrison v. City of New York, 21 Wall. 196, 203.

Three of the justices—Harlan, Field and Brewer, dissent from the conclusion of the court and point out that under its reasoning the legislature, after the judgment was rendered might have forbidden the collection of any interest whatever upon it. They hold that

where a party has recovered a judgment for money growing out of the breach of a contract, he has acquired a right to collect the amount of the judgment, with interest upon that amount, at the rate then established by law, until it is paid, and that he cannot be deprived of this right by mere legislative enactment.

NOTES OF RECENT DECISIONS.

CONSPIRACY BETWEEN EMPLOYERS—ACTION TO RESTRAIN.—In Worthington v. Waring, before the Supreme Judicial Court of Massachusetts, it was sought to restrain what was claimed to be a conspiracy between employers to prevent the hiring of "strikers." The petition alleged that petitioners were weavers by trade, and had been employed by N, a corporation; that they demanded higher wages which N refused to give; that they then left work, and defendants, the officers of N, sent petitioners' names to the officers of other like corporations in the city on a black list, which informed the latter that petitioners had left N on a strike; that defendants conspired together and with the officers of other corporations, and agreed not to employ petitioners, with intent to compel them either to go without work in that city or go back to N at such wages as the latter should see fit to pay them. It was held that the petition could not be maintained, either as an action at law or a suit in equity.

The court thought that if the petition sets forth such a conspiracy as constitutes a misdemeanor at common law—on which they expressed no opinion—the remedy is by indictment. If the injury which had been received by the petitioners at the time the petition was filed constitutes a cause of action—on which they expressed no opinion—the remedy is by an action of tort, to be brought by each petitioner separately. The only grievance alleged which is continuing in its nature is the conspiracy not to employ the petitioners, and the court believed that there are no approved precedents in equity for enjoining the defendants from continuing such a conspiracy, or for compelling the defendants either to employ the petitioners or to procure employment for them with other persons. See Workman v. Smith, 155 Mass. 92, 29 N. E. Rep. 198; Carleton v. Rugg, 149 Mass. 550, 22 N. E. Rep. 55; Smith v. Smith, 148 Mass. 1, 18 N. E. Rep. 595; Raymond v. Russell, 142 Mass. 295, 9 N. E. Rep. 544; Boston Diatite Co. v. Florence Manuf'g Co., 114 Mass. 69. It was plain to the court that the petition was drawn with a view to obtain some equitable relief. It is well known that equity has, in general, no jurisdiction to restrain the commission of crimes, or to asses damages for torts already committed. Courts of equity often protect property from threatened injury when the rights of property are equitable, or when, although the rights are legal, the civil and criminal remedies at common law are not adequate; but the rights which the petitioners allege the defendants were violating at the time the petition was filed are personal rights, as distinguished from rights of property. In answer to the contention of counsel for the petitioners that the petition can be maintained under St. 1887, ch. 383, the court said: "It has been suggested that this suit is partly an action at law and partly a suit in equity; and that, if it cannot be maintained as either the one or the other, it can be maintained under this statute, as partaking somewhat of the nature of both. This statute has been often referred to at the bar as one the meaning of which is not clear, and it becomes necessary to consider it. An examination of it shows that it relates solely to procedure; that it does not purport to change the substantive law, or to create any new cause of action either at law or in equity, or any new kind of relief either legal or equitable, or to change the jurisdiction of the two courts which are mentioned in the first section. It is provided in the fourth section that "nothing in this act shall be construed to * * * extend or limit the power or jurisdiction of the court in proceedings at law or in equity, except as herein expressly provided;" and there is no extension of the power or jurisdiction of either of the courts mentioned expressly provided for in the statute, unless the addition of a new, original process to be used in civil actions at law, made by the first section, is such an extension."

RES GESTÆ—ADMISSIBILITY OF DECLARATIONS AS PART OF—RAILROAD ACCIDENTS.—Justice Coleman, of the Supreme Court of Alabama, discusses the question of *res gestæ*

at length in the case of L. & M. R. R. Co. v. Pearson, handed down by the above court on Jan. 4, 1893. The learned justice deduces the rule as follows: "The real inquiry is, did the main act *proprio vigore* further assert itself and demonstrate its character or interest by impelling the contemporaneous or subsequent declaration or act, offered in evidence and without which the main act is left incomplete and only partially proven, or did the declaration or circumstance offered as *res gestæ* originate from some cause extraneous to the main act. If traceable solely to the main act as the producing cause, and the declaration or circumstance is illustrative of the main act, it is *res gestæ*, otherwise it is mere hearsay or irrelevant and inadmissible as *res gestæ*." And in discussing this question the court says:

Declarations of plaintiff's intestate were admitted in evidence against the objection of the defendant. The admission of this evidence is assigned as error. It is claimed that these declarations were properly admitted as a part of the *res gestæ*. There is evidence tending to show that as plaintiff's intestate attempted to ascend to the top of a moving car the "hand hold" by which he endeavored to pull himself up gave way, and he was precipitated in front of the car, and was run over and crushed. The negligence charged as the cause of the injury was the defective condition of "hand hold." When the car came to a standstill the wheel of the car was on the body of the deceased. The evidence of the witness Lum Edwards shows that he, the witness, was but a few yards off; that deceased called to him to "come and help him;" that he ran up to deceased, and that while the wheel was on the body of deceased, the witness exclaimed "Mr. Crecy what in the world?" and deceased said, "that hand hold let me down." The evidence tends to show that the car was moved off the body about or a little less time than five minutes after the car stopped.

Jesse Williams testified that after the car was rolled off the body in reply to a question as to how it occurred, plaintiff's intestate said, "The hand hold let me down."

Charley Roberts' testimony is to the same effect. Rob Patterson testifies that he was seventy-five or one hundred yards off, when the car run over deceased, "that he got there about five minutes after the car got on him" that while the car was on him deceased said, "The hand hold let me down." This statement, of the declaration admitted as *res gestæ* suffices for a consideration of the question, as to whether they constituted a part of the *res gestæ* of the accident, and as such admissible in evidence. In Grady v. Humphries, 35 Ala. 624, the principle is thus declared, "When it is said that declarations, to be admitted as a part of *res gestæ*, must be contemporaneous with the principal transaction it is not meant that they shall be exactly coincident in point of time with the main fact. If they appear to spring out of the transaction, if they serve to elucidate it, and are made so shortly after the happening of the main fact, as to stand in the relation of unpremeditated result to it, the idea of deliberate design in making them being fairly precluded by the surrounding circumstances then they may be regarded as contemporaneous. In the case of the Ala. Gr. So. R. R. Co. v. Hawk, 72 Ala., the same principle is declared and it is added "The evidence offered must not have the car-marks of a device, or afterthought, nor be merely narrative of a transaction which is really and substantially past . . . the time '*a few minutes*' does not appear to so proximate to the main transaction, nor are the declarations made, otherwise so closely connected with it, as an elucidating circumstance as to justly authorize the conclusion that they are merely narrative of a past occurrence, which at the moment was finished and complete."

In the case of Richmond v. Danville R. R. Co., 93 Ala. 181, in regard to declarations, admitted as *res gestæ*, it is said "They were made five minutes or more after the collision, were not spontaneously made, but in answer to the question *how it happened* after a conversation with the witness as to the extent of his injury; and do not illustrate or explain or receive support from the transaction itself, unless it be as to his supposition that it happened from the carelessness of Hackett in not having out a flagman, which supposition would not have been competent evidence, had the deceased lived and testified for himself."

In Taylor on Evidence, Vol. 1, Sec. 545, it is said: "In all these cases the principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in connection with it, one continuous transaction." The same rule is declared in almost similar language in 1 Gr. Ev. Sec. 108. Many phrases have been used in the endeavor to express definitely and clearly the proper relation and character of a declaration or act to the main fact, by which it becomes *res gestæ*. It is termed a "verbal act, from an act," "a natural impulse from an act," is that which "owes its birth to a preceding fact" "it must spring out of the transaction," and many others might be mentioned. Unless the main fact is relevant and competent evidence the *res gestæ* is inadmissible as evidence. If the declaration be a mere narration of a past complete act, it is not *res gestae*. If it bear evidence of the exercise of reason, or that it is a conclusion of the mind after reflection, it is no part of the main fact, but a mere expression of opinion. In determining whether a declaration or circumstance is a part of the *res gestae*, it is important to consider the time between the main fact or act, and the declaration or circumstance, but *res gestae* cannot be tried by any specified time or number of minutes. . . .

The principle of law upon which the doctrine of *res gestæ* rests, should not be confounded with the principles of law under which the admissions of a party are admissible as *against* him or with the principle upon which dying declarations are admitted as evidence.

Cases will arise in which it is difficult to determine whether the declarations or acts are part of the main act, and *res gestæ* or whether they are mere hearsay, and each case must in great measure be determined by the court when presented. Apply the principles of law to the facts of this case. It seems that the witness was some thirty or forty yards off, saw the accident, that deceased saw him and called for assistance, that witness ran up to deceased, and exclaimed "Mr. Crecy what in the world?" This exclamation of the witness was in effect an inquiry, as to how the accident happened. It was made after deceased had called to him for help. The declaration of the deceased, "The hand hold let me down" was more in the nature of a response to the inquiry of the witness

"What in the world?" than a further assertion or demonstration of the main fact, manifesting itself in the declaration; and this is further apparent, when it is remembered that deceased had prior to that time, called to witness to assist him. We think the declaration was no part of the main fact. It is clear that the declaration of deceased, testified to, made after the car was removed from over the body, and those in response to the questions as to "how it happened" under the acts as proven, were not *res gestae*. The court erred in admitting the declarations of the deceased.

NEGOTIATION OF NOTES PAYABLE TO MAKER'S ORDER.

The law governing the negotiation of notes payable to the order of the maker, although to some extent regulated by statute, has received so little attention from the courts, and is in so crude a state, that remarks of the courts of last resort upon any feature of it, although the veriest dictum, is apt to be accredited with too much weight. And with a view of meeting the danger of attaching such undue importance to the words of the court, uttered incidentally in an opinion, the consideration of the above mentioned branch of commercial law is important, and particularly so because of the remarks of Judge Brace in the case of First Nat. Bank v. Payne,[1] in which the learned judge speaks of the necessity of endorsement of paper made payable to maker's order.

The real question decided in the above case was as to the admissibility of the evidence of strangers to the note, to prove when the defendants (indorsers) put their names on the note; the maker of the note, and the cashier of the bank being dead. Also, it was decided that the rule that a person who is a stranger to the note, who puts his name on the back of it, thereby becomes liable as maker, does not apply to notes made payable to the maker's own order. While the latter question led to a casual discussion of the nature of this kind of notes, yet the court followed a Massachusetts precedent in deciding the case, and the discussion being quite incidental, is only entitled to be ranked as *dicta;* but in the absence of direct authority, is apt to lead to incorrect conclusions hereafter, when the courts shall be called upon to determine directly, the nature of negotiation required by the statute concerning this kind of commercial paper. The rule, practically settled, that there is no necessity of any endorsement on such paper to perfect a negotiation under the statute concerning them,[2] and to send them into the financial world as notes payable to bearer, seems not to have been recognized by the learned judge. Notes of this class are a modern invention and seem to have been entirely unknown until well within the present century, but now they are very common, and are in this State and in several others, the object of special statutory provision. In England, this kind of paper seems to have been left to the rules of the common law, for the English statute declaring the negotiability of notes in general[3] was passed long before this kind of paper was known (1704), and there has been no statutory provision made for it since, and this statute of Anne, has there been held not to apply to this variety of paper. In this State, the statute of Anne never has been adopted,[4] it being passed since the fourth year of the reign of James I; but we have as a modification of, or substitute for it, our Section 733, R. S. Mo., which provides for the negotiation of notes made payable to order. While in England, notes made payable to the maker's order, have been left to the uncertain treatment of the common law (which is in fact but the edict of courts), in this country they are placed in a very different condition, and are not only of an earlier origin, but have received a more enlightened treatment, and occupy a more important position in our commerce, than they do in England. The Statute of Anne applied to those notes which were made by one person, payable to the order of some other person, and for this reason, if for no other, is held not to apply to notes payable to maker's own order. Under the decisions of the English courts (the exponents of the common law), notes of this class are only assignable, and are held to be, as Judge Brace says, an incomplete and anomalous kind of instrument, until endorsed by the maker; and probably no claim would be sustained there on such a note passed by delivery only, and not endorsed by the maker.

Our statute concerning paper payable to maker's order,[5] is identical with that of New

[1] 20 S. W. Rep. 41, and given in part in 35 Cent. L. J. 284-5.

[2] R. S. Mo. 1889, § 735.

[3] 3 & 4 Anne, Ch. 9.

[4] Irwin v. Maury, 1 Mo. 194.

[5] R. S. Mo. 735.

York, on the same subject, and provides that when such a note has been negotiated by the maker, it shall in all respects be as if payable to the bearer.

The precise meaning, and scope of the word "negotiated," as used in this section, has only once been directly before any court in this country, and then, in the Kansas City Court of Appeals, in the case of Lowrie v. Zunkel, decided in last March term.

The court held that the delivery of such a note, without endorsement, was a sufficient "negotiation" under the statute.

And the court was clearly right in its ruling, and is supported both by principle and such precedent as is in any way applicable to the case.

It is to be observed that the statute of Anne, both in England, and as adopted in the various States,[6] requires that all notes that come under its provisions shall be negotiable in the same manner as inland bills of exchange—that is, by endorsement,—and some English decisions that may be referred to, or examined, will be found to ignore the validity of that class of notes now under consideration. Some others admit their validity and place them on the same footing as ordinary choses in action; and others credit them as being payable to bearer.

And it was to relieve the courts of the uncertainty attendant upon these conflicting views, that the statute concerning notes made payable to maker's own order (which is in no way a part of the statute of Anne), was passed and adopted in this State as it now stands in § 735, R. S. 1889.

Hence it is patent that English decisions cannot be relied upon to throw any light on the subject, because there is no such statute in England, and those of the several States must be examined, each with reference to its own statute.

For instance, Kentucky and Illinois statutes require all notes to be endorsed when transferred. The statutes of Kansas and Nebraska require that all notes payable to "order" shall pass by endorsement, and those payable to "bearer," by delivery, only, none of these States having any statute equivalent to our § 735; while California and Dakota go to the extent of providing that notes payable to maker's order shall pass without endorsement.

New York, Michigan, Minnesota, Nevada, Wisconsin, Oregon and Idaho, have the same provisions that we have in this State, while the English statute of Anne, without special provision for this class of notes, is practically adopted in New Jersey, South Carolina, Georgia, Tennessee, Colorado and Connecticut, and in Ohio, Rhode Island, and Vermont a neutral policy is adopted, the statute simply requiring that notes may be payable to any person, or order or bearer.

Thus it will be seen that precedent must be carefully examined under the light of the statute of the State wherein the decision was rendered, and its weight adjudged accordingly. Special weight should be given to the decisions of New York, because of its being the source from which we derive our § 735, and also because of its importance as the grand center of commercial matters in this country, where commercial law is required to be well known and properly administered. The monetary transactions of New York City alone exceed in amount all those of the rest of America combined for any given time. And when we say that notes subject to § 733, must be endorsed, while those subject to § 735 pass by delivery alone, we make a harmonious and homogeneous whole out of the otherwise discordant and absurd statutes.

It has been held from time immemorial that bills of exchange, payable to fictitious payee's, can be negotiated without indorsement, and are in effect the same as if payable to bearer.[7]

The reason for this rule was in the fact that the payee being fictitious, could not be found to endorse the bill; and the same reason would be good when applied to promissory notes, payable to fictitious payees. And of late the weight of authority includes, under

[6] § 733, R. S. 1889, in this State

[7] Minet v. Gibson, 3 Term Rep. 482; Phillips v. Imthurm, 114 E. C. L. 692; Collins v. Emmett, 1 H. Bl. 313; Story on Bills, 56 and 200; 3 Kents' Com. 77 and 78; Farnsworth v. Drake, 11 Ind. 103; Bolles v. Stearns, 11 Cush. 320; U. S. v. White, 2 Hill (N. Y.), 154; Plets v. Johnson, 3 Hill, 112; Foster v. Shattuck, 2 N. H. 446; Elliott v. Abbott, 12 N. H. 549; Blodgett v. Jackson, 40 N. H. 21; Forbes v. Espey, 21 Ohio St. 483; Kohn v. Watkins, 26 Kan. 691; Hortsman v. Henshaw, 11 How. U. S. 177; Lane v. Krekel, 22 Ia. 404; Rogers v. Ware, 2 Neb. 39; 1st Parson's Bill's & Notes, 32, 561, 591, 592 and notes; 2d Parsons Bills & Notes 48-50; Edwards on Bills, 125-130 (marginal paging); Chitty on Bills, 158 and note; Coggill v. Bank, 1 N. Y. 113; Dana v. Underwood, 19 Pick. 99 and many other cases.

the rule concerning fictitious payees, those cases where the payee, although not fictitious, is yet in no way interested in the transaction and is not intended to be made a party, but is used simply as a matter of form—in fact, is a figure,head—and the reason given is, that the payee, not being in any way interested, could not be required to endorse, and the note is consequently subject to the same inability to secure an endorsement as if made to a fictitious payee.[8] And our statute (Sec. 735), expressly places promissory notes payable to the maker's order, on the same foundation exactly, and subjects them to exactly the same conditions as notes payable to fictitious payees.[9] The words of the statute are, "such notes made payable to the order of the maker thereof,or to the order of a fictitious person,"etc., etc. Both are included, and both are subject to the same conditions. The note whose endorsement can be obtained is subject to the same rule as the one whose endorsement cannot be obtained; and the rule that is by the statute proclaimed, is the same that the courts have made—*i. e.*, the note passes as if made payable to bearer. Those cases decided under statutes similar to or exactly like ours, uphold the position taken by the court of appeals, and show conclusively that no endorsement was necessary to make a valid negotiation of the note. Plets v. Johnson,[10] holds that the statute (the same as our Sec. 735) was intended to remedy the difficulty of showing title which a *bona fide* holder of such a note labored under when the note was passed to him without endorsement, and the judge justly remarks, "no such difficulty ever did exist when the note had been endorsed," thus supporting our position, exactly. In First National Bank v. Lang,[11] a case almost exactly like the one being considered, the court held the same doctrine. This case in 1 Bosw. is a very clear one, and requires a special statement and examination. Defendants made a note payable to their own order, and plaintiff obtaining the note in the regular course of business, brought suit to collect an unpaid balance on the note. The note was not endorsed by the makers, or any of them, but had been originally given to an insurance company, which had endorsed it to plaintiff bank, for value, and then became insolvent, upon which plaintiffs sued the makers, not making the insolvent company a party to the suit. The makers defended on the ground of non-negotiation of the note, and endeavored to introduce evidence of equities between the original parties, but were ruled out on the ground that the note had been negotiated in accordance with the requirements of the statute (exactly like our Sec. 735),and was now in the han is of an innocent purchaser, for value, before maturity. The defendant excepted, and the principal question directly before the court was whether the negotiation by delivery, without endorsement, was sufficient under the statute.

The appellate court referring to Plets v. Johnson, *supra*, reasserted the statement that the object of the statute was to remove the difficulty the holder of such paper experienced in making title, when the note was negotiated without endorsement. The court also remarked that a note made to maker's order, is in fact payable to a fictitious payee, so far as any additional security is concerned. As distinguishing between "negotiating" and "endorsing" the note, the court said: "The note * * * is to be regarded precisely as if the makers has endorsed it, provided they negotiated it. And we consider that a note is negotiated within the statute when it is delivered by the maker for a consideration received, or agreed to be received, or delivered for circulation, and where, had it been actually endorsed, it would have possessed the character of negotiability. The note in question was certainly negotiated in this sense."

A clearer statement of the correct theory could not be made. In Brouwer v. Hill,[12] the court held, that if the note had been "delivered as an operative and valid security, the title and property in it became vested in the company." The court in Irving Nat. Bank v. Alley,[13] in speaking of the assertion of counsel that the statute was intended to apply to such notes payable to maker's order as were not endorsed, but passed by delivery merely; remarked, "such, indeed is the law." This was a case where the doctrine that such notes pass by delivery alone, and are at all times payable to bearer, is very plainly

[8] Rogers v. Ware, Foster v. Shattuck, Elliott v. Abbott, Dana v. Underwood, Coggill v. Bank, all *supra*.
[9] Plets v. Johnson, 3 Hill, 112.
[10] 3 Hill (N. Y.), 112.
[11] 1 Bosw. (N. Y.) 205.
[12] 1 Sanf. S. C. R. 648.
[13] 79 N. Y. 539.

stated. With the universal holding of the courts, that paper payable to a fictitious payee, is payable to bearer, and with the statute placing notes payable to maker's order, on the same basis, and with such interpretation of the statute by the courts, it seems that but little more need be said. Nevertheless as the rules of statutory construction may be invoked, we will give them consideration. Section 735, aforesaid, first appeared on our statute book in the revision of 1835, and is contemporaneous with the section now numbered 733, which is our modification of the Statute of Anne. It is held in this State in Irwin v. Maury,[14] that promissory notes when made in compliance with the custom of merchants, were, prior to the passage of the Statute of Anne, negotiable by the common law, and that statute was passed in order to do away with the restrictions placed upon them by the decisions of Lord Holt in his memorable contest with the goldsmiths of Lombard street. And the same case holds that the common law, was adopted in this State, and not the Statute of Anne. Hence, when in 1835, our legislature, following the lead of New York, saw fit to enact a modification of the Statute of Anne, and add a section concerning notes made payable to the maker's own order, or to a fictitious payee, they were not adding a new feature to our law, but were modifying one that had been well known to the courts for years. Bank v. Lang, *supra;* Record of Revising Com. N. Y. Section 735, aforesaid is as follows: "Such negotiable promissory notes, made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer." * * * If the note has been negotiated by the maker, it then becomes as one payable to bearer, and henceforth, as a matter of course, passes by delivery; and the only question is whether the original "negotiation" by the maker, must be by endorsement, or whether it may be by delivery alone, for value.

Sections 733 and 735, appearing on the statute book simultaneously, and continuing side by side for a period of nearly sixty years, are neither of them the creature of chance, but are intended to perform the duties allotted to them, and as they both have reference to the same general subject and are intimately related, they must be considered together. Sutherland on Statutory Construction, Secs. 283-7. The first section (733), is very comprehensive, and includes in its provisions all notes payable to "any person or order," and provides that they shall be negotiable "as inland bills of exchange." Sec. 735, is special in its application, and is confined to one particular class of notes, those payable to maker's order or fictitious payees—and recognizing the peculiar difficulties surrounding such instruments, does not confine the manner of their negotiatton to any particular form, but leaves it to be done in any proper way. Notes payable to genuine payees, or order, must by the requirements of Sec. 733, be negotiated as "inland bills of exchange," *i. e.*, by endorsement. The phrase, "as inland bill of exchange," qualifies the term "negotiated," and notes payable to genuine payees, or their order, must be endorsed by the payee, in order to satisfy the statute; and no one ever thinks of trying to negotiate them in any other way; but the legislature by leaving out the qualifying phrase in Sec. 735, evidently intended that the notes referred to in that section should be "negotiated" in any way known to the law. We cannot presume that the legislature inadvertently omitted the qualifying phrase in one section, or placed it in the other, but must accept the sections as they stand, as the result of their careful consideration. And the legislature must be presumed to act, having in view, the light of previous judicial determination, and the inherent difficulties and impossibilities lying in the way of securing the endorsement of fictitious payees; which judicial determination was to the effect that notes made to fictitious payees were properly negotiated by delivery; and under this light thrown upon the subject, the legislature placed notes made payable to the maker's order in the same condition. Hence, because the negotiation is restricted to endorsement in Sec. 733, and not so restricted in Sec. 735, and because the courts had settled that delivery was sufficient for those notes effected by Sec. 735, we must conclude that the legislature also intended delivery to be sufficient.

The word "negotiated," has varied uses,

[14] 1 Mo. 194 (1822.)

and is used in commercial law to designate the transaction that passes the title to various kinds of commercial paper from one party to another, and is by no means confined to such transactions as require endorsement. Thus to negotiate a promissory note payable to John Smith, or bearer, it is only necessary for Smith to deliver the note for value, and the act is complete; the note is negotiated—while if the note was payable to his "order," he must by force of statute, endorse it, to make a complete negotiation. But after he has endorsed it in blank, it becomes payable to bearer, and can then be negotiated any number of times simply by delivery. Shares of stock in an incorporated company can be negotiated so as to pass a complete title, only by delivery and a transfer on the books of the company. Other kinds of paper, or securities, can be negotiated in different manners, and the term can by no means be confined to those transfers that can be made valid only by endorsement. The idea that there are different meanings to the term "negotiated," is emphasized by the use of the word in Sec. 733, above referred to. In that section the requirement is that the note be negotiated as an inland bill of exchange; leaving the inference conclusive that there were other ways in which it might be negotiated. It is one of the fundamental rules of construction that a statute must be construed so as to give force and effect to all parts of it, if such construction can reasonably be had, and repeals by implication are looked upon with disfavor.[15]

And another rule, closely linked to these, particularly in this case, is, that when two statutes, or parts of statutes, appear on the Statute Book at the same time, affecting the same subject matter, and one of them is general in its nature, and covers all of the subject, while the other is special in its nature, and is confined to one particular class of the subject that is dealt with in the general statute, the special statute removes from the operation of tne general statute, that class, or part of the subject to which it specifically applies, and where there is any conflict in the use of the terms, the special statute has preference in its own sphere. Applying these rules to the case under consideration, we find that section 733, covers all promissory notes payable to order, and section 735, covers that class of such notes as are payable to the maker's order. Section 733 requires all notes to which it applies to be negotiated by endorsement, and if section 735, requires the same manner of negotiation for the notes to which it applies, the section is useless and only cumbers the Statute Book. For by section 733, all notes payable to order are considered, and this plainly includes those made payable to the maker's order, which are the special subject of section 735. Hence, if we would construe section 735, to mean anything at all that requires it to be upon the Statute Book, we must construe it to mean something else than is meant by section 733, and as it is special, while section 733 is general, its meaning must have preference. To say in section 733, that all notes payable to order must be endorsed, and in 735, to say that those notes payable to the maker's order must be endorsed, is simply foolish repetition, and the rules of construction forbid it.

It seems to the writer that no different conclusion could have been arrived at by the court of appeals than the one stated in their opinion, and as they were brought face to face with the question and met it fairly, and with grave consideration, their opinion is entitled to great weight. The dictum of Judge Brace in the case of Bank v. Payne, it is sincerely hoped will be modified when the question is squarely before the court. And until that time, such weight as is due to it in its true place in the merits of the case, will be accorded by all who have reason to refer to it.

CHARLES L. SIMMONS.

St. Joseph, Mo.

[15] Sutherland Statutory Cons. *supra*. Also, a statute will be construed with reference to the whole system of which it is a part, *Ibid*.

NEGLIGENCE—PROXIMATE CAUSE.

WESTERN RAILWAY OF ALABAMA V. MUTCH.

Supreme Court of Alabama, December 1, 1892.

There is no causal connection between the act of a railway company in running its train at a prohibited rate of speed, within the corporate limits of a city, and an injury to a ten-year old boy, who undertakes to climb on one of its freight cars while so in motion, and missing his footing falls and is crushed under the wheels, as to render the company liable in damages.

STONE, C. J.: The plaintiff, George Mutch, was a resident of Opelika. His son, James Mutch, was nine and one-half years old, well grown and developed for his age, and, in intelli-

gence and brightness, was above the average of boys of his age. He went at large without being attended by a nurse or protector, and was attending school. The Western Railway of Alabama runs through Opelika, and has a station and depot in that city or town. There was an ordinance in force in Opelika which made it unlawful to run a train of cars within the corporate limits at a higher rate of speed than four miles an hour, and imposing a penalty for its violation. A freight train of the railroad was coming into Opelika on an afternoon in March, 1889. It had box cars, and attached to the side of one of them was a ladder, placed there to enable brakemen to reach the top of the car. The little boy, James, having placed himself at the side of the track, attempted to seize the ladder as it passed him, that he might climb up on it, and thus enjoy a ride. He did succeed in catching a round of the ladder, but, in attempting to ascend, he missed his footing, fell under the train, and was so injured and crushed that he died of the wounds. Up to this point there is no conflict or uncertainty in the testimony. The present suit was brought against the railroad, and plaintiff seeks to recover damages from it for this alleged negligent killing of his intestate. The negligence charged (and there is no other pretended, or attempted to be shown) is that the train was being moved at a greater rate of speed than four miles an hour. Some of plaintiff's witnesses testified that it was moving at the rate of six or seven miles an hour. On the other hand, defendant's witnesses placed the speed, some as low as three, and none above four miles an hour. This was not the first time intestate had attempted to spring on moving trains, and he had been more than once cautioned against such attempts. Assuming that the speed of the train was in excess of four miles an hour, was there a causal connection between such breach of duty on the part of the railroad company and the injury done to plaintiff's intestate?

Persons who perpetrate torts are, as a rule, responsible, and only responsible, for the proximate consequences of the wrongs they commit. In other words, unless the tort be the proximate cause of the injury complained of, there is no legal accountability. In that able and valuable work, 16 Amer. & Eng. Enc. Law, 436, is this language: "A 'proximate cause' may be defined as that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred; and it is laid down in many cases, and by leading text writers, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen, in the light of the attending circumstances." On page 431 of the same volume it is said: "To constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence, without intervening efficient causes; so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury." That philosophic law writer Dr. Wharton (Law of Negligence, § 75), expresses the principle as follows: "If the consequence flows from any particular negligence, according to ordinary natural sequence, without the intervention of any human agency, then such sequence, whether foreseen as probable, or unforeseen, is imputable to the negligence." Quoting from Chief Baron Pollock with apparent approval, he (in section 78) says: "I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this: That a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In the same section he quotes approvingly the following language from Lord Campbell: "If the wrong and legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action." In Shearman & Redfield's Law of Negligence (section 26) the principle is thus stated: "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred." The authorities from which we have quoted are every where regarded as standard. What they assert is but the condensation of the utterances of a very great number of the highest judicial tribunals, wherever the principles of the common law prevail. See 16 Amer. & Eng. Enc. Law, 428, 429; Railway Co. v. Kellogg, 94 U. S. 469; Herring v. Skaggs, 62 Ala. 180; Daughtery v. Telegraph Co., 75 Ala. 168. Lynch v. Nurdin, 1 Q. B. (N. S.) 29, 41 E. C. L. 422, is the strongest of the cases relied on in support of the present action. The injury in that case occurred in a city. The headnote contains a summation of the facts as follows: "Defendant (a cart man) negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play. Another child incautiously led the horse on, and plaintiff was thereby thrown down, and hurt." It was held that the action was maintainable for

the recovery of damages, "and that it was properly left to the jury whether defendant's conduct was negligent, and the negligence caused the injury." In delivering his opinion, Lord Denman used the following language: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. * * * Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent: that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." Reading the case of Lynch v. Nurdin in the light shed upon it by Lord Denman's reasoning, no one can fail to note the marked difference between that case and the one we have in hand. The argument by which the learned lord chief justice supported the judgment he announced has no application to the present one. That case was manifestly decided on the well-recognized principle that if one leave dangerous machinery, or any other thing of similar nature, unattended, and in an exposed place, and another be injured thereby, an action on the case may be maintained for such injury, unless plaintiff was guilty of contributory negligence. Clark v. Chambers, 3 Q. B. Div. 327; Kunz v. City of Troy (N. Y. App.), 10 N. E. Rep. 442; Stout v. Railroad Co., 2 Dill. 294; Beach, Contrib. Neg. §§ 140, 206. Infants of tender years, and wanting in discretion, are not amenable to the disabling effects of contributory negligence. In the opinion of the court in the case of Lynch v. Nurdin the causal connection between the negligence and the injury was so direct and patent that the driver, exercising ordinary care and prudence, should have anticipated and guarded against it. The implication from Lord Denman's language is very strong that he regarded the cart man's conduct as grossly negligent. Contributory negligence is no defense to injuries which result from gross negligence. But the principle declared in Lynch v. Nurdin was, if not materially shaken, at least shown to be inapplicable to a case like the present one, in the two later English cases of Hughes v. Macfie, 2 Hurl. & C. 744, and Mangan v. Atterton, L. R. 1 Exch. 239. See, also, McAlpin v. Powell, 70 N. Y. 126; Wendell v. Railroad Co., 91 N. Y. 420; Railroad Co. v. Bell, 81 Ill. 76. The case of Messenger v. Dennie, 137 Mass. 197, is a strong authority against the right to maintain the present action. Another case relied on in support of the present action is Railroad Co. v. Gladmon, 15 Wall. 401. That case is wholly unlike the present one, and rests on a different principle. The negligence of defendant's agent was manifest, and the injury was the natural consequence of the negligence. Had the driver been looking ahead, as he should have been he would have seen the child's danger, and could and would have stopped his car before his horses did the injury. The causal connection in that case was complete, because the injury resulted so naturally from the driver's inattention that the law regards it as the probable consequence of his negligence. None of the cases cited support the contention of appellee.

The ordinance of Opelika, restricting the speed of trains within the corporate limits to four miles an hour, had one purpose,—one policy. Opelika is a town probably of four or more thousand inhabitants. The railroad antedated the town, and caused its location there. It runs centrally through the business portions of the place. In such conditions, men pursuing business avocations, as well as idlers and curiosity seekers, will congregate about the depot and track of the railroad, and will be constantly crossing, if not standing on, the track. They do both. Knowing this habit of men, most towns located on railroads have ordinances requiring trains passing through them to move at a low rate of speed. Why? Not because they apprehend that reckless persons will attempt to board the train while in motion. The wildest conjecture would scarcely take in an adventure so fraught with peril. The policy was to enable persons who might be standing on the track, or whose business pursuits required them to cross it, to get off the track, and thus escape the danger of a collision. The ordinance had no other aim.

We hold as matter of law that there was no proof whatever in this case tending to show a causal connection between the negligence charged and the injury suffered. To illustrate our view: Let us suppose that the negligence charged against the railroad company had been, not the too rapid movement of the train, but some imperfection, decay, or derangement of the ascending latter which caused plaintiff's intestate to fall and lose his life. Would any one contend the railroad company would be liable for such accident? And is there a difference in principle between the case supposed and the one we have in hand? Charge No. 21, the general charge in favor of defendant ought to have been given. The great English commentator said, "Law is the perfection of human reason." This, in a sense, is true. It is the expression of the combined wisdom of the legislative body. It is the creature, however, of human thought, and nothing human is perfect. Nor is it true that legislative policy is unchanging. Conditions change, and the law which should adapt itself to human wants must change with them. Still, while the law stands on the statute book, it should be obeyed and

conformed to as a rule of action. If we cut loose from its restraints, we expose ourselves to the tempests of human passion and human prejudice, and, like a ship at sea without rudder or compass, will surely be dashed on some of the many shoals which are found all along the voyage of life.

Trial by jury is a bulwark of American, as it has long been of English, freedom, it wisely divides the responsibility of determinative adjudication, of punitive administration, between the judge, trained in the wisdom and intricacies of the law, and 12 men chosen from the common walks of non-professional life; chosen for their sound judgment and stern impartiality. The one declares the rules of law applicable to the issue or issues formed, in the light of the testimony adduced; the other weighs the testimony, determines what facts it proves, and, molded by the law as declared by the court, renders its verdict. In the jury box, and under the oath the jurors have solemnly sworn on the holy evangelists of Almighty God, there is no room for friendship, partiality, or prejudice; no permissible discrimination between friends and enemies, between the rich and the poor, between corporations and natural persons. The ancients painted the Goddess of Justice as blindfolded and jurors must be blind to the personal consequences of the verdicts they render. If the testimony convinces their judgments of the existence of certain facts, they must be blind to the consequences which result from those facts. A wish that it were otherwise furnishes no excuse for deciding against their convictions. Justice thus administered commands the approbation of heaven and earth alike; and a verdict thus rendered meets all the requirements of the juror's oath, in the fullest sense of the word,— a true expression of the convictions fixed on the minds of the jury by the testimony. Independent of the legal question considered above, and which we have declared to be determinative of this case, the verdict of the jury was so palpably against the evidence that a new trial ought to have been granted on that account.

Reversed and remanded.

NOTE.—The doctrine of law embodied in the maxim, *causa proxima non remota spectatur*, is not only obviously just and practical, but when stated abstractly is simple and easy of apprehension. The difficulties only arise, in its application to the particular facts of each case, and so great are those difficulties as to frequently give rise to irreconcilable conflicts of authority. See for instance Heizer v. Kingsland, etc. Mfg. Co., *ante*, p. 108 and note on p. 112, and also Shubert v. Clark, *ante*, p. 192.

Among the tests which have been suggested for determining whether or not a particular act of negligence is the proximate cause of injury in a specific case, the one most frequently adopted and perhaps altogether the most satisfactory, is the existence of an unbroken causal connection between the wrongful act and the injury complained of. When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. Milwaukee, etc. R. C. v. Kellogg, 94 U. S. 469; Insurance Co. v. Tweed, 7 Wall. 44; Scheffer v. Railroad, 105 U. S. 249; Insurance Co. v. Seaver, 19 Wall. 531; Fawcett v. Railroad Co., 24 W. Va. 725; Gordon v. Chicago, etc. R. Co., 44 Mo. App. 201.

The application of this test is illustrated in many decisions very similar in all essential respects to the principal case. In Lowry v. Hannibal, etc. R. Co., 40 Mo. App. 554, the St. Louis Court of Appeals (Thompson, J.) held that the illegal act of the railroad company in running a train at a prohibited rate of speed was not the proximate cause of injury to some young mules which were on the track, and, being too much startled to leave it, ran from fright to a bridge or trestle and were injured without being struck by the train. Lowry v. Hannibal, etc. R. Co., 40 Mo. App. 554. And where plaintiff was injured on defendant's railroad track by a passing train, within the limits of a municipal incorporation, it was held error to instruct the jury that defendant in running its cars through the city at a prohibited rate of speed was guilty of negligence, and that it was essential for plaintiff to show that the violation of the ordinance "was the direct and proximate cause of the injury complained of, and that such injury would not have occurred but for such violation" of the statutory duty. Philadelphia, etc. R. Co. v. Stebbing, 62 Md. 504, 517. So, it is not enough to establish a liability for stock killed by a railroad train at a highway crossing, to prove that the bell was not rung or the whistle sounded as required by law. It must be made to appear by the facts and circumstances proved, that the accident was caused by reason of such neglect. Quincy, etc. R. Co. v. Wellhoener, 72 Ill. 60. See, also, Illinois Central R. Co. v. Gillis, 68 Ill. 317; Chicago, etc. R. Co. v. Elmore, 67 Ill. 176; Rockford, etc. R. Co. v. Linn, 67 Ill. 109; Chicago, etc. R. Co. v. Henderson, 66 Ill. 494; Indianapolis, etc. R. Co. v. Blackman, 63 Ill. 117; Chicago, etc. R. Co. v. McDaniels, 63 Ill. 122; Great Western R. Co. v. Geddis, 33 Ill. 304; Stoneman v. Atlantic, etc. R. Co., 58 Mo. 503; Pennsylvania Co. v. Hensil, 70 Ind. 509.

In a case not altogether unlike the principal case, the evidence showed that the defendant railroad company had omitted to fence its line within the limits of the municipality as required by ordinance, and that plaintiff, a deaf and dumb boy between eight and nine years old, playing on adjoining park, went upon the track and was injured, the Supreme Court of the United States (Mr. Justice Matthews delivering the opinion) held that the question whether the want of the fence was the proximate cause of the child's injury was properly for the jury, and that it was error to direct a verdict for defendant.

Whether or not the injurious consequences of the particular wrongful act complained of must be such, in order to fix a liability on the defendant, as could have been anticipated by him, is a question upon which the cases are not altogether in unison. It has sometimes been held that the defendant's liability is not affected by the fact that the particular injury, complained of, could not have been foreseen by him as the consequence of his wrongful act. Fairbanks v. Kerr, 70 Pa. St. 86; Lake v. Milliken, 62 Me. 240. Instances of this kind are frequently found among the cases on railroad fires. Smith v. London, etc. Ry. Co., L. R. 6 C. P. 14; Pennsylvania R. Co. v. Hope, 80 Pa. St. 373; Henry v. S. Pac. R. Co., 50 Cal. 176. And, also, in those instances where the injuries complained of are the direct result, not of the accident but of the strain, shock or exposure which were the nat-

ural and unavoidable consequences of the accident. Ehrgott v. Mayor, etc., 96 N. Y. 264.

The decided weight of authority however is against the defendant's liability for all his wrongful acts, when they are such as no human being, with the fullest knowledge of the circumstances, would have considered likely to occur. Bellefontaine, etc. R. Co. v. Snyder, 18 Oh. St. 399; Harrison v. Berkley, 1 Strobh. 525; Greenland v. Chaplin, 5 Exch. 243; Sharp v. Powell, L. R. 7 C. P. 258; Blyth v. Birmingham W. Co., 11 Ex. 785; Hoag v. Lake Shore, etc. R. Co., 85 Pa. St. 293.

For instance, the injury to the insurer by negligently causing the death of the insured was held to be remote and an indirect consequence of the act of the wrong-doer. Conn. Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 265. Where a railroad collision, caused by the negligence of the defendant, produced such severe bodily injuries to the deceased as resulted in insanity, under the influence of which he committed suicide, the Supreme Court of the United States held that the negligence was too remote, saying, through MR. Justice Miller: "The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not a natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train." Scheffer v. Railroad Co., 105 U. S. 249.

But where a defendant railroad company dropped a burning coal on a horse in a street and caused him to run away and strike against a traveler in the street who injured the plaintiff in his own frantic effort to escape, it was held liable for the injury so caused. Lowery v. Manhattan R. Co., 99 N. Y. 158.

BOOK REVIEWS.

AMERICAN PROBATE REPORTS, Vol. 7.

This series of reports is of especial value to those interested in the subjects of the probate and construction of wills. It contains the leading cases upon those topics decided by the different courts of the United States within the past few months. The selection of cases is very good and there are valuable notes appended to many of them. It is published by Baker, Voorhis & Company, New York.

LAWYERS' REPORTS, ANNOTATED, Book 16.

This volume contains the principal cases decided by the courts of the United States and the different States since the publication of volume 15. The cases are not only well selected but there are many valuable notes appended; in fact we think the notes to be found in this series of reports are unexcelled in accuracy and exhaustiveness. It is published by the Lawyers' Co-operative Publishing Company, Rochester, New York.

TAYLOR'S MANUAL OF MEDICAL JURISPRUDENCE.

Those interested in the subject will find this book, which is the eleventh American edition, of considerable interest. It treats of medical evidence, poison, corrosive and irritant poisons, metallic irritants, neurotic poisons, wounds and personal injuries, death by asphyxia, such as drowning, hanging, strangulation and suffocation, etc., pregnancy, delivery, criminal abortion, infanticide, legitimacy, paternity, rape, and insanity. The book has long been the authority upon the subject of which it treats. It is published by Lea Bros. & Company, Philadelphia.

UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS, Vol. 1.

This is the first volume of the reports intended to embrace only the decisions of the United States Circuit Courts of Appeals. It contains the cases determined by this court in all the circuits from the organization of the court. To many of the cases, valuable notes are appended and at the beginning of the work is a copy of the act establishing the Circuit Courts of Appeals, the rules of court as adopted by the United States Circuit Courts of Appeals, and a list of the judges of the courts for the different circuits. The publication of this series of reports will be of great value to the profession. It is published by the West Publishing Company, St. Paul.

THE GREEN BAG, Vol. 4.

The publishers of this entertaining magazine are to be congratulated upon the success of their efforts. The *Green Bag* occupies a place in legal literature not supplied by any other publication, and we are pleased to see that each year gives it a stronger foothold in the struggle for place. The present volume is the col lection of the monthly issues for the year 1892, bound in a very handsome way. An interesting feature of this magazine is its excellent illustrations and engravings of prominent jurists and judges. The present volume contains interesting articles with illustrations on the subject of the Supreme Courts of Georgia, Indiana, Minnesota, Kansas, Arkansas and North Carolina. The volume also contains well written articles on Caleb Cushing, Mr. Justice Bradley and John K. Porter. There are many interesting *causes celebres* and some Missouri yarns, which were probably concocted outside the State.

BROWNE'S BLACKSTONE'S COMMENTARIES.

This book is almost a pure and unadulterated edition of Blackstone's Commentaries. It has been the custom heretofore for editors of Blackstone to explain and illustrate the text by copious annotations. The editor of this work, doubting whether in an elementary work of this nature on the general principles of English law a profusion of notes is an advantage, and whether their great number and variety will not tend to confuse the student and to some extent divert his attention from the original text, concluded to make no mistake, and has therefore given us a text with but few notes and those of a very general character. The editor states that he has labored to retain in this edition all of Blackstone's great work, which has any bearing whatever upon the present law, whether it be the law itself as now operative or the grand principles which underlie it. A novel addition to the book is the glossary of nearly two thousand legal terms, maxims and brief latin phrases used in the commentaries with abridged definitions. Biographical sketches of lawgivers and writers mentioned in the commentaries are appended to this edition, and also a chart of the line of descent of the sovereigns of England from the date of the heptarchy to the present time. The book is published by L. K. Strouse & Company, New York.

BOOKS RECEIVED.

A Treatise on the Admissibility of Parol Evidence in Respect to Written Instruments. By Irving Browne, Editor of the Albany Law Journal and the American Reports. New York: L. K. Strouse & Company, 63 Nassau Street, 1893.

The Principles of the American Law of Contracts at

Law and in Equity. By John D. Lawson, B. C. L., LL. D., Professer of Common Law in the University of the State of Missouri, and Author of "Rights, Remedies and Practice," "The Law of Usages and Customs," "Leading Cases Simplified," etc., etc. St. Louis: The F. H. Thomas Law Book Co. 1893.

The American Corporation Legal Manual. A Compilation of the Essential Features of the Statutory Law Regulating the Formation, Management and Dissolution of General Business and Insurance Corporations in America, North, Central and South, with Brief Summaries as to England, Germany, The Netherlands, France, Italy and Russia. Also a Synopsis of the Patent, Trademark and Copyright Laws of the World. Prepared Expressly for this Work by Members of the Bar in the different Localities. For the use of Attorneys, Officers of Corporations, Inventors and Business Men. Vol. 1,—1893. To January 1, 1893. Edited by Charles L. Borgmeyer, Member of the New Jersey Bar. Newark, N. J. 1833. Honeyman & Company, Law Book Publishers. Plainfield, New Jersey. U. S. A.

HUMORS OF THE LAW.

"What side is the gentleman on?" asked the stranger who had been listening for two hours to a lawyer arguing a case in the Supreme Court. "I don't know," replied the gentlemanly door-keeper; "he hasn't committed himself yet."

One day, upon removing some books at the chambers of Sir William Jones, a large spider dropped upon the floor, upon which Sir William, with some warmth, said, "Kill that spider, Day! Kill that spider!" "No," said Mr. Day, with that coolness for which he was so conspicuous, "I will not kill that spider, Jones; I do not know that I have a right to do so. Suppose, when you are going in your carriage to Westminster Hall, a superior being, who may perhaps have as much power over you as you have over this insect, should say to his companion, 'Kill that lawyer! Kill that lawyer!' How should you like that? I am sure to most people a lawyer is a more noxious insect than a spider."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION AGAINST CORPORATION.—In a suit against a private corporation, the complaint is fatally defective unless it contains an unequivocal averment that it is a corporation.—MILLER V. PINE MIN. CO., Idaho, 31 Pac. Rep. 803.

2. ADVERSE POSSESSION.—Where, in ejectment, it appears that a division fence was by mistake built and maintained for more than 10 years over the line on plaintiff's land, and that defendant and his grantors claimed to own the land to the fence, and had actual possession thereof during such period, with the knowledge and acquiescence of plaintiff, such possession was adverse, though the acquiescence of plaintiff was because he supposed the fence was on the true line.—RAMSEY V. OGDEN, Oreg., 31 Pac. Rep. 778.

3. APPEAL—Record.—A finding by the trial court that plaintiffs' causes of action are barred by limitation is conclusive on appeal, where no exceptions were taken to such finding, and where the appeal not was taken within 60 days after judgment rendered.—RICHARDSON V. DUNNE, Cal., 31 Pac. Rep. 737.

4. APPEAL—Transcript.—Code Proc. § 1419, providing that no appeal shall be dismissed for failure to file a transcript, when such failure is owing to the fault or omission of the clerk, "or other circumstances over which appellant had no control," does not require the circumstances to be absolutely beyond appellant's control before relief can be granted, but allows relief even for appellant's own delay or neglect, where the same is fairly excusable; respondent, however, to be compensated for the expense of any motion he may have made meanwhile to dismiss.—SMITH V. ARTHUR, Wash., 31 Pac. Rep. 737.

5. APPEALABLE ORDER—Insolvency.—An order appealed from in insolvency proceedings directed that the assignee make a partial distribution of the funds in his hands to all the creditors except appellant, who was first required to exhaust the collateral security which it had, and then to receive dividends on the balance of its debts: Held, that the order was final, so far as it affected appellant's rights to that portion of the proceeds of the estate which was distributed, and appealable.—IN RE FRASCH, Wash., 31 Pac. Rep. 755.

6. APPEARANCE — Effect.—An appearance by a nonresident for the purpose of objecting to the court assuming jurisdiction over his person operates as an appearance for all purposes.—PACE V. POTTER, Tex., 20 S. W. Rep. 928.

7. ASSAULT WITH INTENT TO MURDER — Evidence—Self-defense.—On a prosecution for assault with intent to murder, evidence of an assault by defendant on the prosecuting witness the day before the one alleged in the indictment is admissible to show motive.—SULLIVAN V. STATE, Tex., 20 S. W. Rep. 927.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferring Creditors.—A debtor in failing circumstances may lawfully prefer one or more of his creditors, and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith, and not made with intent to defraud other creditors.—COSTELLO V. CHAMBERLAIN, Neb., 53 N. W. Rep. 1034.

9. ATTACHMENT — Non residents.—Where defendants, railroad contractors from another State, take a contract within the State, and stay at least a year to finish their contract, and own valuable property within the jurisdiction of the court, and expect after the comple-

tion of their contract to remain permanently, they are not "non-residents," within Code, § 250, providing for attachments against non-residents.—MUNROE v. WILLIAMS, S. Car., 16 S. E. Rep. 533.

10. ATTORNEY AND CLIENT—Contract.—A special contract claimed by an attorney for services in a certain matter cannot be established on the testimony of the attorney alone, where such testimony is directly contradicted by the client, and previous statements of the attorney are shown tending to contradict his testimony, and to confirm that of the client.—PARKER v. ESCH, Wash., 31 Pac. Rep. 754.

11. BANKS—Assignment—Preferred Creditors.—Where a bank collects money for another it holds the same as trustee of the owner, and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim.—ANHEUSER-BUSCH BREWING ASS'N v. ASSIGNED ESTATE OF THE FARMERS' & MERCHANTS' BANK OF HUMBOLDT, Neb., 53 N. W. Rep. 1037.

12. BONDS — Constitutionality — Estoppel.—In an action against the county commissioners of H county to enjoin them from levying a tax to pay county bonds issued in payment for a toll road in M township, purchased under the provisions of Act 1889, p. 276, it appeared that the question of buying the road was properly submitted to the voters of M township, who voted to buy the road. Defendants bought the road, which was conveyed to the county of H, and paid for in county bonds. Plaintiff is a resident voter and taxpayer of M township, and claims that the act under which the road is bought is unconstitutional: Held that, as plaintiff delayed his suit until the county had bought and paid for the road, and plaintiff and others, for whose use it was purchased now enjoy the benefit of it, he is estopped to question the constitutionality of the act.—VICKERY v. BLAIR, Ind., 32 N. E. Rep. 880.

13. BOUNDARIES — Adverse Possession.—When coterminous owners of land establish a boundary line, and take possession to the line so agreed upon, and one of them erects valuable improvements thereon, and holds quiet and peaceable possession thereof, without objection from the other coterminous owner or his grantees, for a period of more than eight years, such line is binding upon them, and those holding under them.—IDAHO LAND CO. v. PARSONS, Idaho, 31 Pac. Rep. 791.

14. BOUNDARIES BETWEEN STATES—River.—The expressions, "middle of the Mississippi river" and "the center of the main channel of that river," as used respectively in the enabling acts under which the States of Illinois and Wisconsin were admitted into the Union, and "middle of the main channel of the Mississippi river," as used in the enabling acts of Missouri and Iowa, all being descriptive of the boundaries of those States, are synonymous terms, and mean the middle of the main navigable channel, or channel most used, and not the middle of the great bed of the stream, as defined by the banks of the river.—STATE OF IOWA v. STATE OF ILLINOIS, U. S. S. C. 13 S. C., Rep. 239.

15. CHATTEL MORTGAGES—Powers of Sale.—Where a note secured by a deed of trust of chattels is given as collateral security for other notes, the cancellation of these latter notes for usury does not affect the trustee's power of sale under the deed of trust.—COCKE v. CROSS Ark., 20 S. W. Rep. 913.

16. CONSTITUTIONAL LAW — Appropriation.—Under Const. § 46, providing that no act or resolution for the appropriation of money or the creation of a debt shall become a law unless, on its final passage, it receive the votes of a majority of all the members elected to each house, the vote to be taken by yeas and nays and entered in the journal, it is necessary, where a bill originating in the senate is amended in the house, that the amendment be concurred in by the senate, on a yea and nay vote, by a majority of all the members.—NORMAN v. KENTUCKY BOARD OF MANAGERS OF WORLD'S COLUMBIAN EXPOSITION, Ky., 20 S. W. Rep. 901.

17. CONSTITUTIONAL LAW — Uniform Taxation.—Act Oct. 24, 1874, as amended by Act Feb. 5, 1885, relieving the Willamette Valley & Coast Railroad from the payment of all taxes for a period of 20 years, in consideration of its agreement to carry the troops and munitions of war of the State for such time is in conflict with Const. § 32, art. 1; *Id.* § 1, art. 9, requiring that "all taxation shall be equal and uniform," and that the legislature "shall provide by law for uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property."—HOGG v. MACKAY, Oreg., 31 Pac. Rep. 780.

18. CONTRACTS — Disaffirmance by Infant.—One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority.—BLOOMER v. NOLAN, Neb., 53 N. W. Rep. 1039.

19. CONTRACTS—Mutual Agreement.—A manufacturing company mailed defendant a proposition for the sale of certain mill machinery, with a blank acceptance for defendant to sign and return. Defendant wrote on the margin of the acceptance, "Changed to conform to our letter," and returned it with a letter not accepting the proposition in full, but changing the time and terms of payment. In answer to this the company wired that it had entered the order, but added, "See letter," and sent a letter suggesting different times and terms of payment than proposed by defendant: Held, that the minds of the parties had not met on the terms of payment, and no contract was made.—WILKIN MANUF'G. CO. v. H. M. LOUD & SONS LUMBER CO., Mich., 53 N. W. Rep. 1045.

20. CORPORATIONS—Contract — Where the secretary and treasurer of a corporation owns a majority of its stock, and has entire charge of its business, a written assignment of a contract between it and another corporation, signed by him as "secretary and treasurer for" the company, naming it, is sufficient to enable the assignee to maintain an action thereon against the other party to such contract.—MOORE v. H. GAUS & SONS MANUF'G CO., Mo., 20 S. W. Rep. 975.

21. CORPORATIONS—Guaranty.—A corporation which had guarantied the payment of the principal and interest of railroad bonds payable in 1911 subsequently went into the hands of a receiver. The railroad company was solvent, had secured the bonds by mortgage of all its property, and had promptly met all coupons: Held, that owners of the railroad bonds could not prove the guaranty of the corporation, and have a dividend declared thereon, or have money retained in court to meet a possible future liability on the guaranty, as against creditors of the corporation, who were pressing for a sale and distribution, and who held either specific and general liens or demands past due.—GAY MANUF'G CO. v. GITTINGS, U. S. C. C. of App., 53 Fed. Rep. 45.

22. CORPORATIONS — Stockholder's Liability — Defenses.—A subscriber for stock in a corporation offered, while the company was solvent, to pay for this stock, but the company refused to receive the money or to issue stock to him. The stockholder, however, took no action to absolve himself from his subscription contract, but continued active in the company's business until it became insolvent and embarrassed: Held, that the offer and its refusal constituted no defense to an action by the assignee of the corporation to recover on the subscription.—POTTS v. WALLACE, U. S. S. C., 13 S. C. Rep. 196.

23. CORPORATION—Validity of By-laws.—A joint-stock corporation has power by by-law to declare that no person who is attorney against it in a suit shall be eligible as a director.—CROSS v. WEST VIRGINIA CENT. & P. RY. CO., W. Va., 16 S. E. Rep. 587.

24. CRIMINAL EVIDENCE—Confessions.—In a criminal

prosecution, the confession or admission of the accused is not alone sufficient to justify conviction. That the crime charged has been committed must be established by other testimony. A voluntary confession may be proven for the purpose of connecting the accused with the offense.—ASHFORD V. STATE, Neb., 53 N. W. Rep. 1036.

25. CRIMINAL EVIDENCE—Evidence improperly Procured.—Criminatory articles and letters, pertinent to the issue in a criminal case, are admissible in evidence, though they were procured from defendant in an irregular or even an illegal manner.—COMMONWEALTH V. TIBBETTS, Mass., 32 N. E. Rep. 910.

26. CRIMINAL EVIDENCE—Homicide.—In a prosecution for murder, where there is evidence of a conspiracy to commit the crime between defendant and a co-defendant, and that they were together at the time of the homicide, it is not error to allow the State to prove acts and declarations of the co defendant showing the latter's hatred against deceased, and preparations and attempts to kill him, though at the time of such acts and declarations no conspiracy existed.—HARRIS V. STATE, Tex., 20 S. W. Rep. 916.

27. CRIMINAL LAW—Appeal from Justice's Court.—In a criminal prosecution before a justice of the peace where a construction has been given by the justice of the peace to its own proceedings, the same construction, if reasonably possible, should be given to such proceedings by the appellate court; and generally an appellate court should give to the proceedings of the lower court such a construction, if reasonably possible, as will harmonize and uphold them.—STATE V. WOOD, Kan., 31 Pac. Rep. 786.

28. CRIMINAL LAW—Bail—Murder.—On an application for bail by a person charged with murder, petitioner testified that the shooting was done in self-defense, and gave a description of how it occurred: Held, that bail was properly refused where it appeared that the description of the circumstances of the shooting given by him immediately after it occurred was totally different from that given by him on the examining trial, and that the wounds from which deceased died could not have been inflicted as testified to by defendant.—EX PARTE PACE, Tex., 20 S. W. Rep. 922.

29. CRIMINAL PRACTICE—Embezzlement.—Under Act 1881, which provides that "if any clerk, apprentice or servant, agent or employee," to whom any money, note, or other chattels have been intrusted for the benefit of his "master, principal, or employer," shall go away with such property, with intent to steal the same, or embezzle or otherwise convert it to his own use, such person shall be deemed guilty of larceny, an indictment is good where it charges that defendant, having in his possession, as "general financial agent," for the purpose of negotiating the same, a certain note, (describing it), "fraudulently did embezzle, steal, take, and carry away said note, with intent, then and there, feloniously to steal the same, and did unlawfully and feloniously convert the note to its own use, with like intent to steal the same.—HELLER V. PEOPLE, Colo., 31 Pac. Rep. 773.

30. CRIMINAL PRACTICE—Perjury—Elector's Qualifications.—An indictment for perjury alleged that B had not the legal qualifications as to residence to vote at an election held in the county of H and State of I, and that defendant, when B's vote was challenged, well knowing B had no right to vote, and to enable him to vote corruptly, took an oath required by law before H, the election inspector, who had authority to administer it, that B did have the legal qualifications as to residence of a voter. The venue of the affidavit was worded: "State of Indiana,——County—ss." The inspector signed his name to the jurat, but not his official title: Held, that the indictment, though somewhat informal, is good.—STATE V. HOPPER, Ind., 32 N. E. Rep. 878.

31. CRIMINAL PRACTICE — Prosecuting Attorney.—Where a person has been regularly elected and has qualified as county attorney, and is in the possession and control of the office, and the district court recognizes him as such county attorney, and permits him to institute, carry on, and conduct a criminal prosecution in such court, assisted, however, by a regularly admitted attorney at law, and the defendant is convicted and sentenced, his sentence should not be set aside or reversed in the supreme court upon the ground merely that the county attorney was not a regularly admitted attorney at law.—STATE V. SMITH, Kan., 31 Pac. Rep. 784.

32. CRIMINAL TRIAL—Impeachment of Witness.—On a trial for murder, C, a witness called by defendant, was asked on cross-examination if he did not tell P on the night of the murder that defendant and his brother, finding deceased unarmed, "took the advantage" of him. To this question C, under objection by defendant, answered in the negative, whereupon the State called P, who testified that C had so said: Held, that the question asked C, being incompetent by reason of its seeking an opinion of the witness, the calling of P to impeach C was reversible error.—DAVIS V. STATE, Tex., 20 S. W. Rep. 923.

33. CUSTOM AND USAGE — Contract. — A steamboat company, in contracting, through its agent, to pay plaintiff and his assistants an agreed sum per day to clear a river of snags for navigation purposes, is not chargeable with knowledge of a local custom existing among lumbermen to pay the board of their men in cleaning out streams for the purposes of running logs, even though the agent resided in that vicinity.—PENNELL V. DELTA TRANSP. CO., Mich., 53 N. W. Rep. 1049.

34. DEED — Conditions Subsequent. — The action of ejectment is the proper remedy to recover real estate which has been granted by a deed containing a condition subsequent, upon a failure to perform which, the estate of the grantee is to determine.—MARTIN V. OHIO R. R. CO., W. Va., 16 S. E. Rep. 589.

35. DEED—Description.—A deed describing the land conveyed merely as so many acres to be taken by the grantee from a larger tract, wherever he may select, is not void for uncertainty.—DOHONEY V. WOMACK, Tex., 20 S. W. Rep. 950.

36. DETINUE — Married Woman.—A direct sale and transfer, for a fair and valuable consideration, of personal property, by husband to wife, confers, as against strangers who are not creditors of the husband, a title thereto upon the wife, which may enable her to maintain an action of detinue, in the name of herself and husband, to recover the same, when unlawfully detained.—ROBINSON V. WOODFORD, W. Va., 16 S. E. Rep. 602.

37. DOMICILE—Evidence.—When one has changed his abode, and wishes to prove change of domicile, all acts which show his purpose within a reasonable time before and after the event may be put in evidence, together with the declarations accompanying such acts, and therefore, in an action to recover a personal tax alleged to have been illegally assessed, plaintiff could testify that just before starting for Chicago, and a few days before the assessment, he notified the assessors that he was about to change his residence; and what plaintiff said to two witnesses immediately on his arrival in Chicago in regard to the measures necessary to establish his residence and acquire citizenship in Chicago was likewise admissible as a part of the *res gestæ*.—VILES V. CITY OF WALTHAM, Mass., 32 N. E. Rep. 901.

38. ELECTIONS AND VOTERS — Registration. — The elector's oath, enacted at the first session of the legislature of the State of Idaho, and approved February 25, 1891, held not to be an *ex post facto* law, not in the nature of a bill of attainder, and to be clearly within the constitutional power of the legislature. — SHEPHERD V. GRIMMETT, Idaho, 31 Pac. Rep. 793.

39. EMINENT DOMAIN — Evidence — Damages.—In an action against defendant railroad company to recover for land appropriated for its road, the record sought to be introduced by defendant, of condemnation proceedings instituted by another company in regard to the same land 12 years before defendant's entry thereon,

was properly rejected, there being no evidence that such other company had ever conveyed any supposed title it had acquired to the land, and the service of the notice of the application on the owner of the land being invalid.—DOYLE v. KANSAS CITY & S. RY. CO., Mo., 20 S. W. Rep. 970.

40. ESTATES—Contingent Remainder.—Rev. St. 1889, § 8838, provides that, where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take as purchasers in fee simple: Held, where a deed conveyed land to C "for and during her natural life, and with remainder to the heirs of her body," that the common-law estate tail became a life estate for C, with a contingent remainder in fee simple to the heirs of her body.—GODMAN v. SIMMONS, Mo., 20 S. W. Rep. 972.

41. EXECUTION — Exemptions—Earnings.—When the statute makes the wages or earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under control of the debtor, although temporarily in the hands of another.—ELLIOT v. HALL, Idaho, 31 Pac. Rep. 796.

42. FEDERAL COURTS — Circuit Court of Appeals. —The United States Circuit Court of Appeals has no jurisdiction to review a judgment rendered before the act creating that court was passed, where the amount claimed was too small to give jurisdiction to the supreme court, since there is nothing in said act giving it a retrospective effect.—UNITED STATES v. NATIONAL EXCH. BANK OF MILWAUKEE, U. S. C. C. of. App., 53 Fed. Rep. 9.

43. FEDERAL COURTS — Circuit Court of Appeals—Habeas Corpus.—Under Act March 3, 1891, §§ 4, 6, the circuit courts of appeals have succeeded to the appellate jurisdiction of the circuit courts under Rev. St. § 763, for reviewing *habeas corpus* proceedings in the district courts.—UNITED STATES v. FOWKES, U. S. C. C. of App., 53 Fed. Rep. 13.

44. FEDERAL COURTS—Circuit Court of Appeals—Jurisdiction.—No appeal lies from a territorial supreme court to the circuit courts of appeal in an action of assumpsit between citizens of the territory for goods sold and delivered; for by the judiciary act of March 3, 1891, § 15, appeals from territorial supreme courts are limited to cases in which the judgments of the circuit courts of appeal are "made final by this act," and in section 6 its judgments are made "final" only in controversies in which the jurisdiction depends on diverse citizenship, in admiralty cases, and in cases arising under the patent laws, the revenue laws, and the crim inal laws.—AZTEC MIN. CO. v. RIPLEY, U. S. C. C. of App., 53 Fed. Rep. 7.

45. FEDERAL JURISDICTION—Diverse Citizenship —A limited partnership organized under the laws of Pennsylvania, and empowered thereby to sue in its partnership name, is neither a corporation nor a citizen of that State, within the meaning of the statute requiring diverse citizenship to give jurisdiction to a federal circuit court; and it can only maintain such a suit by averring the proper citizenship of the partners.—CARNEGIE, PHIPPS & CO. LIMITED v. HULBERT, U. S. C. C. of App., 53 Fed. Rep. 10.

46. HIGHWAYS—Prescription.—Where it appears that land has been used by the public as a road, but that no claim has been made by the county or the public to the exclusive use of such land as a road, and it does not appear that such use was otherwise than permissive, no prespective right is acquired in the land for the purpose of a road.—CUNNINGHAM v. SAN SABA COUNTY, Tex., 20 S. W. Rep. 941.

47. HUSBAND AND WIFE—Husband's Debts.—Where property is alleged to have been purchased by a wife, or a conveyance of property is made to her during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made the purchase, or that the property was conveyed to her, amounts to nothing, unless accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it, and it will be subject to his debts.—BROOKS v. APPLEGATE, W. Va., 16 S. E. Rep. 585.

48. IMMIGRATION—Contract Labor Law.—In an action at law by the United States to recover the penalty for a violation of the contract-labor law, a complaint alleging that defendant offered to one of its employees in Canada to continue his employment if he would come to the United States, and that in consideration of such promise, and in pursuance of such agreement, he did come to the United States, and work for the defendant, is sufficient to show the acceptance of the offer in Canada, under the Montana rule that pleadings shall be liberally construed, with a view to substantial justice.—UNITED STATES v. GREAT FALLS & C. RY. CO., U. S. C. C. (Mont.), 53 Fed. Rep. 77.

49. INTOXICATING LIQUORS — Sales to Minors. — An indictment stating that defendant "did unlawfully and knowingly sell and give, and cause to be sold and given, spirituous, vinous, and intoxicating liquors, to one W, the said W being then and there a person under the age of twenty-one years," sufficiently charges the defendant with knowledge that the vendee was a minor.—WOODS v. STATE, Tex., 20 S. W. Rep. 915.

50. JUDGMENT.—The judgment being absolutely void, the court has no power to set it aside; but it may, to prevent annoyance which might be occasioned by the attempted execution of a void judgment, either stay or arrest the process.—KREISS v. HOTALING, Cal., 31 Pac. Rep. 740.

51. JUDGMENT — Award — Appeal.—Code § 426, which provides that the court to which an award of arbitrators has been delivered shall treat it as the verdict of a jury, and authorizes the same proceedings concerning it as though it were a verdict in a civil action, interpreted in the light of section 429, which provides that if it shall appear that the arbitrators have committed error in fact or law the court may refer the cause back, with directions to amend the award, and, on their failure to do so, "the court shall be possessed of the case, and proceed to its determination," clothes the court with full jurisdiction to proceed to a final determination of the controversy whenever the arbitration has failed; and a judgment of the court setting aside the award is not such a final order as will sustain an appeal.—TACOMA RAILWAY & MOTOR CO. v. CUMMINGS, Wash., 31 Pac. Rep. 747.

52. JUDGMENT — Parties. — The fact that a certain corporation is named as defendant in a complaint, while judgment is rendered against another not named, does not render the judgment irregular, where the latter appeared and filed an answer which, if true, showed the identity of the two.—HAYNES v. BACKMAN, Cal., 31 Pac. Rep. 746.

53. JUDGMENT — "Penal Laws."—The words "penal" and "penalty," in their strict and primary sense, denote a punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws, and "penal laws," strictly and properly, are those imposing punishment for an offense committed against the State, which the executive of the State has the power to pardon; and the expression does not include statutes which give a private action against the wrongdoer.—HUNTINGTON v. ATTRILL, U. S. S. C., 13 S. C. Rep. 224.

54. JUDGMENT LIEN.—In an action to subject certain lands owned by defendant's brother to the payment of an account due plaintiffs from defendant, it appeared that the lands were in defendant's name, and in his possession, and that plaintiffs relied on defendant's statement that he was the owner of the land, in giving him credit, but there was no finding that defendant's brother had any knowledge that defendant was ob-

taining credit with plaintiffs on the faith of his apparent ownership of the land: Held, that a judgment refusing to subject the land to the payment of plaintiffs' claim was justified.—BREEZE v. BROOKS, Cal., 31 Pac. Rep. 742.

55. LANDLORD AND TENANT — Lease — Conditions and Covenants.—A lease contained the following clause: "This lease not to be sold, assigned, or transferred without the written consent of the party of the first part:" Held, that this was a covenant, and not a condition, and the lease would pass by an assignment without the lessor's consent, so that the assignee could maintain ejectment under it.—HAGUE v. AHRENS, U. S. C. C. of App., 53 Fed. Rep. 58.

56. LIMITATION—Absence from State.—Rev. St. ch. 83, § 18, declares that if, after a cause of action accrues, the debtor departs from and resides out of this State, the time of his absence is no part of the time limited for the commencement of an action. Section 20 declares that when a cause of action has arisen in another State, and is barred by the laws of that State, an action cannot be maintained thereon: Held, that where a debtor left the State before a cause of action arising therein was barred, and was sued as soon as he returned, the fact that while out of the State he lived in another State long enough to bar the action according to the laws of that State was no defense to the action.—WOOLEY v. YARNELL, Ill., 32 N. E. Rep. 891.

57. LIMITATION OF ACTIONS—Infancy.—Under HOW. St. § 8718, saving the running of the statute of limitations as against infants, neither the appointment of a next friend, nor the actual commencement of an action which is afterwards discontinued, will operate to set the statute running.—KEATING v. MICHIGAN CENT. R. Co., Mich., 53 N. W. Rep. 1053.

58. LOST INSTRUMENT—Warehouse Receipts.—Where a receipt for cotton, issued by the proprietor of a cotton yard, is lost, the owner of such receipt is entitled to the cotton without first indemnifying the proprietor against any claim which might thereafter be made by the finder or holder of such receipt.—CLAY v. GAGE, Tex., 20 S. W. Rep. 948.

59. MANDAMUS—Right to Inspect Records.—The clerk of the county court cannot refuse to permit any person to have access to and inspect the public papers and records in his custody and office as clerk on the ground that no fee has been paid him for such inspection. Neither can he charge any fee, unless he makes a search for a matter of over one year's standing, or is required to make out a copy.—STATE v. LONG, W. Va., 16 S. E. Rep. 578.

60. MARRIED WOMAN—Charge on Separate Estate.—A married woman, having no power, in Ohio, to contract in reference to her separate estate previous to its existence, her promissory note, charging her separate estate with the payment thereof, cannot be enforced in equity against a separate estate acquired by her subsequent to the execution of the note. — ANKENEY v. HANNON, U. S. S. C., 13 S. C. Rep. 206.

61. MARRIED WOMAN—Separate Estate.—The fact that an insolvent husband voluntarily bestows his labor and skill in the business of farming carried on by his wife upon land which is her separate property, and operated with her separate property, will not, in the absence of fraud, render the products the property of the husband and liable for his debts. If such products, after the support of the family, leave a surplus in property attributable to his skill and labor, equity would make a just apportionment between wife and creditors.—TRAPNELL v. CONKLYN, W. Va., 16 S. E. Rep. 570.

62. MASTER AND SERVANT — Defective Appliances.—Where a certain part of the roof of a mine, from which rock falls and injures a workman, was known to the officers to consist of treacherous rock, needing constant watching, and liable to be loosened if wet; and where it appears that it had not been properly tested for weeks; that it had long been wet; that similar rock near by had been supported or removed,—it is a question for the jury whether the failure to support or remove such rock was a lack of ordinary care in providing a safe place for the miners to work in.—UNION PAC. RY. CO. v. JARVI, U. S. C. C. of App., 53 Fed. Rep. 65.

63. MASTER AND SERVANT — Negligence.—A section man on a railway, who releases his hold on a hand car, descends therefrom, stands upon the track on a down grade, in front of a dump car, by chance detached from the hand car, and closely following it at the rate of from three to four miles an hour, and is killed thereby, is guilty of such contributory negligence as to bar a recovery for his death. — CHICAGO & N. W. RY. CO. v. DAVIS, U. S. C. C. of App., 53 Fed. Rep. 61.

64. MASTER AND SERVANT—Negligence.—When a railroad bridge is not properly constructed and maintained, and injuries result to employees, the railroad company will not be excused from liability because of negligence of employees to whom it delegated those duties, even if due care was used in selecting such employees. — GALVESTON, H. & S. A. RY. CO. v. DANIELS, Tex., 20 S. W. Rep. 955.

65. MASTER AND SERVANT — Vice-principal.—An employee charged by the master with the duty of keeping in repair a railway track is not a fellow-servant with the employees operating a train on such track, and therefore, where a switchman is killed at night by stepping from an engine, as it approached the switch he was required to operate, upon a pile of cinders which had been left near the track by negligence of the track foreman in the yard, by means of which the switchman was thrown under the engine, the company is liable.—MISSOURI PAC. RY. CO. v. BOND, Tex., 20 S. W. Rep. 930.

66. MECHANIC'S LIENS—Enforcement—Parties.—In an action to foreclose a mechanic's lien, incumbrancers should be made parties, and all equities which may exist in favor of mortgagors should be determined, and the rights of mortgagees fully adjudicated.—BASSETT v. MENAGE, Minn, 53 N. W. Rep. 1064.

67. MECHANICS' LIENS—Estoppel.—A material man is not estopped from seeking to foreclose his liens for material furnished by him to the contractor by reason of his giving a false receipt for the amount due him, to enable the contractor to obtain a payment from the owner, where the owner has paid out no money, and suffered no loss on account of such receipt.—WASHBURN v. KAHLER, Cal., 31 Pac. Rep. 741.

68. MECHANICS' LIENS — Limitation. — A mechanic's lien continues in force for two years after the date of filing the lien, and in case an action is brought to foreclose the same until judgment is recovered and satisfied. If a summons is issued before the expiration of the two years from the filing of the lien it may be served afterwards within the statutory time, but, if not issued until after the expiration of two years, an action to enforce the lien will be barred.—BURLINGIM v. COOPER, Neb., 53 N. W. Rep. 1025.

69. MECHANIC'S LIENS — Notice.—A statement in a lien notice that claimant agreed to furnish the contractors certain windows, doors, etc., for a building, without specifying the quantity in any way, or that the same were all the doors, windows, etc., used in the construction of the building, does not give the owner sufficient notice.—TACOMA LUMBER & MFG. CO v. WOLFF, Wash., 31 Pac. Rep. 753.

70. MORTGAGES—Deed Absolute.—A deed absolute in form, but given to secure a subsisting debt, is a mortgage.—LAPOWSKI v. SMITH, Tex., 20 S. W. Rep. 957.

71. MORTGAGES—Description.—A mortgage described the land as "situated in the county of J and State of I, to-wit, a part of the west half of the northwest quarter of section fifteen, (15), township thirteen (13) north, range three (3) east, described as follows, to wit: twenty-nine (29) acres off the south end of sixty (60) acres off the north end of the west half of the northwest quarter of said section fifteen (15): Held,

such description sufficiently identifies the land.—COLLINS v. DRESSLER Ind., 32 N. E. Rep. 883.

72. MORTGAGE—Evidence.—In a suit to have a deed absolute in form declared a mortgage, it appeared that, to secure the payment of money borrowed, plaintiff gave a mortgage on her tract of land, excepting four acres, and at the same time a deed was made of the latter as a bonus to induce defendant to advance the money, and both parties understood the contract: Held that, in the absense of any unconscionable advantage taken by defendant, the relief sought would not be granted.—BUTTS v. ROBSON, Wash., 31 Pac. Rep. 760.

73. MORTGAGE—Foreclosure—Sale.—In a proceeding to set aside a foreclosure sale on a showing promptly made, it appeared that the property had brought a very inadequate price; that the deputy having the matter in charge had been asked to bid for the mortgagee in the latter's absence, but had neglected to do so; that the mortgagee's intention to bid was known to the purchaser; and that the mortgagee could not collect any of the deficiency from the mortgagor: Held, that the court might properly set aside the sale.—HAYNES v. BACKMAN, Cal., 31 Pac. Rep. 745.

74. MORTGAGES — Merger.—A mortgagee assigned the mortgage and note as collateral, and thereafter received the fee by a conveyance wherein the mortgage was expressly excepted from the warranty against incumbrances. He thereafter executed a second mortgage as security for a debt past due, giving notice of the prior mortgage to the second mortgagee: Held, that there was no intention to merge the prior mortgage in the fee, nor could such merger take place even if the parties had so intended.—CASE v. FANT, U. S. C. C. of App., 53 Fed. Rep. 41.

75. MUNICIPAL CORPORATION—Defective Sidewalks.—A street line was paralleled by an embankment at a distance of 5 or 6 feet. The embankment was 3 feet high, and connected two houses from 20 to 25 feet apart. The steps from the houses projected to the street line. The land rose slightly from the sidewalk to the embankment, and, including the walk, was all of the same general character: Held, that a barrier was not needed to render the way reasonably safe for persons traveling thereon at night.—LOGAN v. CITY OF NEW BEDFORD, Mass., 32 N. E. Rep. 910.

76. MUNICIPAL CORPORATIONS — Improvement of Streets.—A city of the second class has the power to levy a special assessment for the improvement of a street in front of a court house square within a city without the consent of the board of county commissioners; and, if the claim for such improvement is disallowed by the board, the district court, upon appeal, may adjust the amount thereof, and such a judgment may be paid as other judgments against a county.—BOARD OF COM'RS OF FRANKLIN COUNTY v. CITY OF OTTAWA, Kan., 31 Pac. Rep. 788.

77. MUNICIPAL CORPORATIONS — Officers.—Before Act Cong. May 2, 1890, which adopted and extended over the territory of Oklahoma the laws of Nebraska, the original provisional government of Oklahoma City was not a *de facto* corporation, and had no authority to contract or bind itself or its successors by any agreement. But, from the time *de jure* corporations were authorized, Oklahoma City became a *de facto* corporation, and, when this was subsequently changed to a *de jure* corporation, the latter became liable for the valid contracts of the former; and plaintiff, who acted as clerk of the common council for the city during its *de facto* existence, is entitled to recover his salary for such period from the *de jure* corporation.—BLACKBURN v. CITY OF OKLAHOMA CITY, Okla., 31 Pac. Rep. 782.

78. NATIONAL BANKS—Purchase of Note.—Even if, under U. S. St. 1864, ch. 106, § 8, authorizing national banks to "discount and negotiate" notes, the purchase of a note by such a bank is *ultra vires*, it is an ordinary contract, not being made penal or expressly forbidden, and the maker or indorser cannot defend on the ground that the bank has acquired no title. The violation of the law can be availed of only in proceedings against the bank, in the interest of the public, to deprive it of its charter.—PRESCOTT NAT. BANK OF LOWELL v. BUTLER, Mass., 32 N. E. Rep. 909.

79. NATIONAL BANKS — Shareholders—Compounding Statutory Liability.—A federal court will not, even if it has the power under Rev. St. § 5234, grant an order authorizing a receiver of a national bank to compound the statutory liability of certain stockholders by accepting payment of a gross sum, less than is due, in satisfaction and discharge thereof, although more money would thus be realized than by proceedings to collect the same in the usual way, when it appears probable that such stockholders have fraudulently conveyed their property to avoid their legal obligations as stockholders, or to shield themselves from injury and exposure by litigation.—IN RE CERTAIN STOCKHOLDERS OF THE CALIFORNIA NAT. BANK OF SAN DIEGO U. S. D. C. (Cal.), 53 Fed. Rep. 38.

80. NATIONAL BANKS — Taxation.—Under the law of New Mexico, which requires property to be assessed at its cash value, property of a national bank was so assessed, but on appeal to the board of equalization the assessment was reduced to 85 per cent. of the full value: Held, that the mere fact that other property was assessed at 70 per cent. of its value, not through any design or systematic effort on the part of the assessors, would not justify an injunction to restrain the collection of the tax.—ALBUQUERQUE NAT. BANK v. PEREA, U. S. S. C., 13 S. C. Rep. 194.

81. NEGLIGENCE — Highway—Burden of Proof.—The fact that defendant's team, while passing along unattended, collided with plaintiff's team, which approached unattended from the opposite direction at the side of the street on the left hand from plaintiff's team, does not show *prima facie* evidence of defendant's negligence, and Pub. St. ch. 93, § 1, providing that when persons meet each other with vehicles they shall drive to the right, has no application.—BROULT v. HANSON, Mass., 32 N. E. Rep. 900.

82. NEGOTIABLE INSTRUMENT—Burden of Proof.—In an action on a draft, the execution of which defendant admits, but pleads no consideration, the burden of proof is on defendant to establish want of consideration.—MCKENZIE v. OREGON IMP. CO., Wash., 31 Pac. Rep. 748.

83. NEGOTIABLE INSTRUMENT—Misrepresentation of Payee.—Where, in an action by the payees of a note against the sureties, it appears that defendants were induced to sign as sureties by the representation of plaintiffs that they had mortgages securing all of the maker's indebtedness to them, when they had mortgages securing only part of such indebtedness, plaintiffs are not entitled to recover.—GALBRAITH v. TOWNSEND, Tex., 20 S. W. Rep. 943.

84. NUISANCE.—To entitle a party to maintain a private action for obstructing a public street, it is not necessary that the obstruction should cut off all access to his property.—ALDRICH v. CITY OF MINNEAPOLIS, Minn., 53 N. W. Rep. 1072.

85. PARTIES—Plea to Jurisdiction.—The complaint alleged that defendant had obstructed the way to plaintiff's premises by digging two ditches, and prayed that he be compelled to fill them up. Defendant by plea in abatement, answered that the ditches were dug by an irrigation company, of which he was president; but no order was made, making the company a party defendant: Held, that the facts set up in the plea in abatement showed that the irrigation company was a necessary party, and that a judgment ordering defendant to fill up and destroy the ditches was erroneous.—BATES v. VAN PELT, Tex., 20 S. W. Rep. 949.

86. PARTNERSHIP—Dissolution.—Two partners agreed to dissolve; one to release all his interest in the assets, and the other to adjust all debts shown on a certain exhibit or on the books, unless the partnership should finally be settled in insolvency, in which case the agreement was to be void. Performance by the last named partner was guarantied by a creditor: Held, not to include a debt not shown on the exhibit, and

which, being due the other partner, would have been postponed to that of the creditor.—ABERCROMBIE V. SPALDING, Mass., 32 N. E. Rep. 911.

87. PARTNERSHIP—Evidence.—Declarations by a person that he and W are partners are not admissible against W to establish the facts of partnership, if made in his absence.—SALINAS CITY BANK V. DE WITT, Cal., 31 Pac. Rep. 744.

88. PARTNERSHIP — Settlement—Mistake.—Where a settlement of a copartnership was to be made on the basis of a payment by defendant to plaintiff of any balance shown by the books, and on settlement an item in favor of plaintiff which should have been included was omitted by mistake of plaintiff, and either by mistake of defendant or with his knowledge, and with knowledge of plaintiff's misapprehension of the settlement, plaintiff thereafter is entitled in equity to a correction of the mistake.—MOORS V. BIGELOW, Mass., 32 N. E. Rep. 900.

89. PLEADINGS—General Denial.—Where a general denial is sufficient in form, and there is nothing on the face of pleadings to show that it is false, the court will not enter into an examination of the merits of the defense upon affidavits.—UPTON V. KENNEDY, Neb., 53 N. W. Rep. 1042.

90. PLEADING - Negotiable Instrument - Abatement.—The fact that a note sued on is not due is a matter in abatement; and, if this can be made, apparent only by facts involving a reformation of the note sued on, the answer must contain a prayer for reformation.—NORRIS V. SCOTT, Ind., 32 N. E. Rep. 865.

91. PLEADING — Statements by Way of Recital. — In actions of trespass or trespass on the case for torts, if the facts necessary to state a cause of action are stated under a *quod cum* or after a whereas, such mode of statement must be regarded as recital, and such count is fatally defective on general demurrer.—SPIKER V. BOHRER, W. Va., 16 S. E. Rep. 575.

92. PRINCIPAL AND AGENT—Agent's Authority.—On the question of authority of an agent of a business concern, the party dealing with him may prove the course and manner of business in that concern as connected with such agent, from which actual authority may be implied, though the party did not know of such course and manner of business at the time of dealing with the agent.—COLUMBIA MILL CO. V. NATIONAL BANK OF COMMERCE, Minn., 53 N. W. Rep. 1061.

93. PRINCIPAL AND AGENT — Evidence. — The declarations of an alleged agent at the time of making the contract for which the principal is sought to be bound are admissible in evidence before proof has been made of the agency, when such declarations are followed by competent evidence tending to establish the agency; the order of the introduction of evidence being discretionary with the trial court.—ROBERT V. LEE SILVER MIN. CO. V. ENGLEBACH, Colo., 31 Pac. Rep. 771.

94. PROHIBITION — Jurisdiction of District Court.—Since the present constitution, which is followed by the acts of the legislature, in conferring jurisdiction on the district courts gives them power to issue only "writs of *habeas corpus* in felony cases, *mandamus*, injunction, *certiorari*, and all writs necessary to enforce their jurisdiction," without giving them supervisory control and jurisdiction over inferior tribunals, as was given by the prior constitutions, and since they can only exercise such jurisdiction as is conferred upon them by statute, a district court has no jurisdiction to issue a writ of prohibition against proceedings in a justice's court.—SEELE V. STATE, Tex., 20 S. W. Rep. 946.

95. PUBLIC LANDS — Pre emption — Abandonment.—One S filed his declaration of intention to claim certain land near Helena, Mont., under the pre emption law. He built a cabin, and lived there part of the year 1869. He then removed to Helena, and resided there nine years. Thereafter he resided in Butte City. He failed to comply in any way with the pre emption law after leaving the land: Held, that he had abandoned his right to purchase when he left the land. — NORTHERN PAC. R. CO. V. AMACKER, U. S. C. C. (Mont.), 53 Fed. Rep. 48.

96. QUIETING TITLE—Pleading.—In an action to quiet title, where the complaint alleges that defendant purchased the land of a minor, who disaffirmed the sale on becoming 21 years of age, and afterwards sold it to plaintiff, an answer which attempts to plead an estoppel is defective if it fails to allege that the minor made representations as to his age, in connection with the sale to defendant, as an inducement for him to purchase, and upon which he relied.—BRADSHAW V. VAN WINKLE, Ind., 32 N. E. Rep. 877.

97. RAILROAD COMPANIES—Injuries.—In an action against a railroad company for the death of plaintiff's husband from a collision with an engine while on defendant's track, it was error to charge that, if the deceased voluntarily placed himself on the track, and those in charge of the engine saw him before it reached him, but failed to ring the bell or blow the whistle, in order to warn him of its approach, then defendant would be guilty of negligence, as the question as to whether, since the action, the train men were negligent was a question of fact for the jury.—TEXAS & P. RY. CO. V. ROBERTS, Tex., 20 S. W. Rep. 960.

98. RAILROAD COMPANIES—Negligence—Pleading.—In an action against a railroad company for causing the death of a brakeman by reason of the defective condition of a coupling the complaint need not aver affirmatively that the company knew, or had the means of knowing, that the coupling was defective.—LOUISVILLE, E. & ST. L. C. R. CO. V. UTZ, Ind., 32 N. E. Rep. 881.

99. RAILROAD COMPANIES—Street Railways—Negligence. — Standing on the rear platform of a moving street car, even when there is room inside, is not under ordinary circumstances, negligence *per se*, at least in the absence of any published rule of the carrier forbidding it.—MATZ V. ST. PAUL CITY RY. CO., Minn., 53 N. W. Rep. 1071.

100. REAL ESTATE AGENTS — Commissions.—Plaintiff, a real estate agent, was given the sale of defendant's lands, at a given price, on commission, and, after having found a purchaser, defendant was notified, and wanted to raise the price, but finally agreed to sell for all cash, whereupon plaintiff made the sale, and tendered the purchase price to defendant, who refused to ratify the deal: Held, in an action for commissions, that though, by the terms of the contract, commissions were to be paid only in case of sale, and then only on the proceeds arising therefrom, the owner was liable where an acceptable purchaser was produced, and the failure to consummate resulted from the failure of the owner to enter into a binding contract.—MILLETT V. BARTH, Colo., 31 Pac. Rep. 769.

101. REAL ESTATE AGENT — Commissions.—Plaintiff while employed as agent of the owner to sell lands on commission, made an arrangement with defendant by which, if he brought about a sale of the land to him, he was to have an interest in it, and a commission from defendant. Plaintiff represented to the owner that the land was not worth the amount he claimed, and at the same time, to defendant, that it was worth more than they were paying for it, and concealed from him his relations with the owner. Both the owner and defendant relied to some extent on plaintiff's judgment as to the value of the lands: Held, that plaintiff did not act in good faith with defendant, and could not recover the agreed commissions.—MCDONALD V. MALTZ, Mich., 53 N. W. Rep. 1058.

102. REAL ESTATE BROKER — Commissions.—Where husband and wife where jointly sued for commissions on a sale of the wife's property, it was not error for the court, after holding that there was no evidence of a joint promise, to permit the discontinuance of the action as against the husband.—CODD V. SEITZ, Mich., 53 N. W. Rep. 1057.

103. REMOVAL OF CAUSES—Citizenship.—In a suit to cancel a promissory note, brought by the maker

against the holder and his indorsee for collection, who has been made a defendant merely in order to retain the note within the jurisdiction of the court, the indorser may remove the cause to the federal court on his sole application.—NEW YORK CONSTRUCTION Co. v. SIMON, U. S. C. C. (Ohio), 53 Fed. Rep. 1.

104. REMOVAL OF CAUSES—Diverse Citizenship.—A suit by a State in one of its own courts against a citizen of an another State is not removable to a federal circuit court on the ground of diverse citizenship of the parties.—STATE OF INDIANA v. TOLLESTON CLUB OF CHICAGO, U. S. C. C. (Ind.), 53 Fed. Rep. 18.

105. REPLEVIN FROM SHERIFF.—Where a sheriff levies a writ of attachment upon property found in the possession of one not a party to the suit, in an action of replevin therefor by such person, the officer, to justify the taking, is required to show that the attachment writ was regularly issued; in other words, that the writ is regular on its face, and was issued upon a sufficient affidavit by a court having jurisdiction of the parties and the subject matter of the action.—HAKANSON v. BRODLE, Neb., 53 N. W. Rep. 1038.

106. RES JUDICATA—Parol Evidence.—When defendant pleads *res judicata*, parol evidence is not admissible to contradict the record and substitute the opinion of witnesses as to the meaning and effect of the pleadings and judgment in the former case.—MCGRADY v. MONKS, Tex., 20 S. W. Rep. 959.

107. SALE—Delivery—Possession.—In an action to recover certain mares and colts seized on an execution against plaintiff's husband, plaintiff testified that her husband sold her 16 mares in satisfaction of a debt. The mares were pastured on the husband's land prior to the sale, and were branded with his brand, but at the time of the sale they were brought to the corral, vented with the husband's brand, and then branded with plaintiff's brand. A bill of sale was also given, and they were then turned back on the range where they had been before, and cared for, at seasons requiring care, by men hired and paid by plaintiff: Held, that there was sufficient delivery and change of possession of the property.—ASBILL v. STANLEY, Cal., 31 Pac. Rep. 738.

108. SALE—Warranty.—Defendant agreed to take a certain amount of cheese, saying. "If in the course of ten days we find this cheese as you have represented it, we will pay." Defendant received the cheese, and, after 26 days, notified plaintiff that the cheese was not as represented, and refused payment: Held, having failed to return it within 10 days, he must be considered as having accepted it, and cannot be heard to set up the defense of breach of warranty.—POTTER v. LEE, Mich., 53 N. W. Rep. 1047.

109. SET-OFF—Limitation of Action.—How. St. § 7370*a*, which provides that, where a defendant has given notice of set off, plaintiff shall not discontinue his suit without defendant's consent, does not prevent plaintiff from withdrawing a portion of his claim; and the portion thus withdrawn is not *res judicata*, but may be pleaded as a set-off in an action against him by defendant.—BUSCH v. JONES, Mich., 53 N. W. Rep. 1051.

110. TAXATION — Mandamus.—An application for *mandamus* to compel the placing of certain property on an assessment roll will be denied, when made so late as to deprive the owners of any right to review the assessment.—MAURER v. CLIFF, Mich., 53 N. W. Rep. 1055.

111. TRIAL—Change of Venue.—Code Proc. § 161, provides that "the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial as provided" in section 162, as follows: "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county:" Held, that the statute refers to two classes of persons,—residents of the State and non residents; the former being entitled to trial in the county in which they reside.—KENNEDY v. DERICKSON, Wash., 31 Pac. Rep. 766.

112. TRIAL—Conversations in Presence of Jury.—Where, in the course of a trial, counsel communicates, in the presence of the court and jury, with third persons, to obtain information to be used in framing questions to a witness under examination, it is not error to refuse to exclude the subsequent testimony of such witness or to strike it out, on request, even though such communication is so made as to give to the jurors information which may affect their verdict; but the proper remedy is to request an instruction that the jury disregard what had happened, or that they be discharged, if, in the opinion of the court, what had happened was of such a nature that it must influence the verdict.—COMMONWEALTH v. TRIPP, Mass., 32 N. E. Rep. 905.

113. TRIAL—Refreshing Memory of Witness.—It is proper, in order to refresh the recollection of one's own witness, to read to him extracts from evidence given by him on a previous trial, and to ask him if, having heard such passages read, he did not recollect the facts as he formerly testified.—EHRISMAN v. SCOTT, Ind., 32 N. E. Rep. 867.

114. VENDOR'S LIEN.—The doctrine of a vendor's lien arising by implication exists in the State of Iowa.—FISHER v. SHROPSHIRE, U. S. S. C., 13 S. C. Rep. 201.

115. VENDOR'S LIEN—Notice.—A firm which owned all the stock of a water company, and whose employees were its officers, purchased pumping engines, contracting that the same should be subject to a lien for the price, and placed them in the company's works, After erection, the engines remained in the exclusive charge and management of the seller's agent. Meanwhile the firm disposed of all its stock, and conveyed to the water company the land on which the engines stood: Held, that the company had notice of the lien, and took subject thereto.—NEW CHESTER WATER CO. v. HOLLY MANUF'G CO., U. S. C. C. of App., 53 Fed. Rep. 19.

116. VENDOR AND VENDEE—Possession under Parol Contract.—A purchaser of land by parol contract which had been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity has an equitable right in said land so purchased, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor.—SNYDER v. BOTKIN, W. Va., 16 S. E. Rep. 591.

117. VENDOR'S LIEN — Enforcement.—In a suit in equity to enforce a vendor's lien, where fraud and misrepresentation on the part of the plaintiff are relied on by the defendant in his answer as to the quantity of the land which was conveyed to the defendant by the plaintiff without warranty, and the deed has been accepted and recorded by the defendant, the burden of proving such fraud and misrepresentation rests upon the defendant.—FLEMING v. KERNS, W. Va., 16 S. E. Rep. 600.

118. VENDOR AND VENDEE—Mistake—Equity.—Where land is sold by the acre, and the parties are under a mutual mistake as to the quantity conveyed, equity will grant the purchaser a proportionate abatement of the price.—FRANCO TEXAN LAND CO. v. SIMPSON, Tex., 20 S. W. Rep. 953.

119. WATERS—Riparian Rights—Navigable Waters.—The right of the riparian proprietor upon navigable waters to improve, reclaim, and occupy the submerged lands out to the point of navigability may be separated from the shore land, and transferred to one having no interest in the parent riparian estate.—BRADSHAW v. DULUTH IMPERIAL MILL CO., Minn., 53 N. W. Rep. 1066.